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DISCUSSION RESPONSE

Putschists behind Bars?

Regional Criminalization of Unconstitutional Changes of Government in Africa

BALINGENE KAHOMBO — 27 January, 2017

This contribution results from our cooperation with the journal „Swiss Review of International and European Law" an discusses an article by Abdoulaye Soma on the international crime of unconstitutional changes of government, which was published in December 2016.

The Point of Departure

Regionalism continues to increasingly develop in various fields of law. Abdoulaye Soma, who acknowledges the birth of an African international criminal law, analyses one of its specificities: *the crime of unconstitutional changes of government*. The latter constitutes one of the fourteen crimes falling within the jurisdiction of the Criminal Section of the African Court of Justice and Human Rights (ACtJHR), created by the Malabo Protocol of June 2014.

Soma indicates that it is the first time in international law that unconstitutional changes of government are outlawed in terms of an international crime, while their rejection is quite widespread in practice. Pursuant to Article 28E of the Malabo Protocol, the crime consists of "(…) committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power: a) A putsch or coup d'état against a democratically elected government; b) An intervention by mercenaries to replace a democratically elected government; c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination; d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution; f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors". Soma suggests that this progress might be the final stage of the internationalization of constitutional law in Africa. But, the crime is still part of *lex ferenda* as the Malabo Protocol has not yet come into force. In addition to its material acts, he identifies its moral element in a triple dimension, i.e. the intent to commit any of such acts, the special intent of accessing or maintaining power and the knowledge of the illegality of the latter facts. Soma also argues that this crime can be committed only collectively, by *de facto* or *de jure* rulers,

always through positive action and not by omission, directly, indirectly or by attempt, and as perpetrators or accomplices. The aim is to protect democracy, peace and security in Africa. But, the repression would face some challenges, notably state officials' immunities and the concurrent power of the Peace and Security Council (PSC) or even the AU Assembly to qualify situations of unconstitutional changes of government. He proposes a solution comparable to the relationship between the UN Security Council and the ICC with respect to the crime of aggression.

Although the author's arguments are globally tenable, they do not seem to be sufficiently grounded or clear on the passage from prohibition to such regional criminalization, the potential perpetrators of the crime in question and the challenges to its repression.

From Prohibition to Criminalization

This is an unclear point in Soma's paper. The prohibition of unconstitutional changes of government began at the time of the Organisation of the African Unity (OAU). The author mainly refers to the Lomé Declaration of 2000. But, the process is a bit older. It comes back to the early 1990s, including at the (sub-) regional level, following the revival of democratization in Africa. The term "unconstitutional changes of government" is used as such in the Declaration of Grand Bay (Mauritius) in April 1999 (point 8 (p)) as one of the causes of human rights violations in the continent. But, the Lomé Declaration is the first instrument to have defined the content of the prohibition, procedures and sanctions of the OAU in reaction to its violation. The AU, which inherited this legal framework, conventionalized the notion (AU Constitutive Act of 2000; Protocol on the PSC of 2002; African Charter on Democracy, Elections and Governance (ACDEG) of 2007). The Malabo Protocol improves it, as Soma writes, in criminal matters. But, it might not be the end of the process. The next regionalization of constitutional law could be the creation of a Pan-African Constitutional Court (Assembly/AU/Dec.458 (XX), January 2013) or the United States of Africa. Moreover, the crime at issue is prior to the Malabo Protocol. It is part of *lex lata* at least after the entry into force of the ACDEG (15 February 2012), which obliges states parties to "(…) bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition" (art.25 (9)). The states parties have agreed to do so in accordance with article 23 of the ACDEG, which defines unconstitutional changes of government in reference to a non-exhaustive list of its constituent material acts. In this regard, national cases require a specific inquiry. As with the Malabo Protocol, it creates, in accordance with the ACDEG (art.25 (5)), a system of criminal justice overlapping domestic judicial apparatus.

Soma has not elucidated this passage from prohibition to the criminalization of unconstitutional changes of government. Rather, he invokes general ideas about protecting democracy, peace and security in Africa. True, the crime is directed against "a democratically elected government", to be defined pursuant to AU instruments. But, which democratic values and principles are protected? The Lomé Declaration notably mentions the adoption of a Constitution whose preparation, content and method of revision should be in conformity with generally acceptable principles of democracy; the respect for the Constitution and adherence to the provisions of the law adopted by Parliament; the principle of democratic change and recognition of a role for the opposition; and the organization of free and regular elections. As with peace and security, the principal aim is the protection of the security and political stability of African states without which no integration is possible. The insistence on the commission of the crime through the intervention of mercenaries, rebellions or political assassinations reminds that the incrimination rejects subversive activities which are often fomented from abroad in violation of state sovereignty and the self-determination

of African peoples. Many unconstitutional changes of government have occurred in the way since 1960 (Togo, Republic of Congo, Nigeria, Ghana, Comoros, Central African Republic, Burkina Faso, Benin, etc.).

Still, the shift to criminalization is justified since violations of the simple prohibition have not ceased to increase. The AU has even deplored "the resurgence of the scourge of coups d'état in Africa" (Assembly/AU/Dec.220 (XII), February 2009). The means of reaction to these situations (mainly the suspension from the AU) have yielded little success. The perpetrators of the crime often remain unpunished; they regain legitimacy after organizing fraudulent elections and their governments ultimately reintegrate the AU. Criminal law then intervenes as a regional measure of last or *severe* resort. It also implies that African states, in addition to the duty to prosecute the perpetrators of the crime, should not recognize their governments or conduct foreign relations with their states until the constitutional order is re-established.

The Potential Perpetrators of the Crime

Undisputedly, unconstitutional changes of government constitute a pluralistic crime. It can be committed only by more than one person. But, the exclusion of its commission by omission is not convincing. It is more a problem of participation in the crime and the distribution of roles between perpetrators. One of these may be a statesman who, knowing that a coup d'état is being executed, omits to discharge his duty to defend the state institutions under his protection in order to facilitate the success of operations he is part of. Likewise, the characterization of perpetrators as solely *de jure* or *de facto* rulers is not entirely tenable. This is because outside those who have "the aim of illegally accessing or maintaining power", there are also accomplices, devoid of such a special intent, who may have with knowledge supported that accession or maintenance. Accomplices might not necessarily be rulers. This is the case of mercenaries. Nothing explains why they should not be subject to this incrimination, in addition to the crime of mercenarism, even though they do not themselves accede to power. Accomplices may also be members of a band constituted or used to capture the power or even a scientist who may be recruited to support and facilitate the manipulation of the Constitution to prevent a democratic change of government. Even though such perpetrators are not rulers, the struggle against impunity would not be served if they were not subjected to the crime. The same applies to corporations which organize or finance unconstitutional changes of government as the Malabo Protocol admits criminal liability of legal persons, with the exception of states. The only possibility to escape prosecutions is the child status (art. 46D, Malabo Protocol) or any acceptable ground for excluding criminal responsibility such as the mistake of law or even the mistake of fact.

Anyway, the problem with the Malabo Protocol is that it proceeds, unlike the ACDEG, to an exhaustive enumeration of constitutive acts of unconstitutional changes of government. A situation whereby an incumbent government *deliberately* refuses, at the end of its term limit, to organize elections, as now in the Democratic Republic of Congo (DRC), and sticks on power, by *maliciously* alleging technical or financial problems, is not covered. Therefore, the PSC may qualify, pursuant to its founding Protocol and the ACDEG, other acts, whose perpetrators cannot be tried by the AU Court. This is an unjust differentiation. Maybe, the Malabo Protocol should include "any other act of comparable gravity which is a breach of democratic change of government, resulting from the non-observation of laws in order to maintain power, inconsistently with the Constitution". The formulation is in line with the principle of legality. It would enable to prosecute rulers who rely on their own bad governance, like in the DRC's case, in order to illegally cling to power. Reversely, it would deter other citizens to resort to violence as an

ultimate mean to come to power. As Soma writes, bad governance does not justify unconstitutional changes of government. The proposed formulation would help to equally outlaw the case on the part of both the citizens and the rulers. If waiting for that change in law a government is all the same overthrown by the citizens, bad governance could perhaps influence the *quantum* of the penalty to apply, except capital punishment whose application is prohibited (art.43A, Malabo Protocol).

The Challenges to the Repression

The AU Court is not yet operational. Soma has shown its imbrications with domestic tribunals and potential criminal jurisdictions of others African organizations known as Regional Economic Communities, to which it is expected to be complementary. But, he finds a contradiction between the possible prosecutions of unconstitutional changes of government before the AU Court and the Malabo Protocol which leaves applicable before it personal immunities for certain incumbent state officials, i.e. "Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions" (art.46Abis, Malabo Protocol). But, the fear of impunity can be tempered because rulers holding their power from unconstitutional changes of government should not be recognized and so no immunity would apply to them. The reason is that they are or become illegitimate and illegal rulers *ab initio*, that is to say from the time when the commission of the crime in question is completed. It is submitted that this consequence is a particularity of unconstitutional changes of government and does not apply to other crimes under the jurisdiction of the AU Court. But, while such non-recognition would open the doors for regional prosecutions against the suspects, it is without prejudice to AU diplomatic contacts and initiatives aiming to restore democracy (art. 25(3), ACDEG). The same might be applicable to foreign criminal jurisdictions. Domestic tribunals will even remain for a while the unique competent judicial forums over this crime in Africa. Effectiveness and efficacy of prosecutions will depend here on the adoption of implementation legislations and appropriate instruments to ensure interstate judicial cooperation. Anyway, the risk of unjust prosecutions against boring political opponents, by accusing them of attempting to commit a coup against the sitting government, cannot be totally excluded. Cautiousness is required!

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